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SUPREME COURT, U.S.
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No. 08-801

IN THE

Supreme Court of the United States

YLUMINADA MOJICA and JULIO ACEVEDO,
as Legal Representatives of JOSHUA ACEVEDO,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF

MINDY MICHAELS ROTH
BRITCHER, LEONE & ROTH, LLC
175 Rock Road
Glen Rock, N.J. 07452
(201) 444 - 1644

Attorneys for Petitioners

222631

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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ARGUMENT

In it's Brief in Opposition, Respondent presents three arguments against certiorari. First, it argues that this Court has previously declined to review *Brice v. Secretary of HHS*, 240 F.3d. 1367 (Fed Cir. 2001), *cert. denied sub nom.*, 534 U.S. 1040 (2001) and there is no reason for a different result here. Second, it argues that the special nature of the Vaccine Act program cuts against the availability of equitable tolling. Third, it argues that equitable considerations of petitioners' asserted diligence and the lack of prejudice to the respondent are irrelevant and inconsistent with a statutory scheme designed to ensure that claims are settled "quickly and easily". Respondent's arguments disregard the facts in this case, the opinions of the Courts below in this matter, and the goals for which the Program exists.

Before addressing the flaws in Respondent's specific arguments, it is appropriate to note that Respondent's Statement of Facts is consistent with those submitted by the Petitioner. Additionally, Respondent concedes that it was timely served with the Petition, but due to the "apparent mishandling" of the Petition entrusted to the third party courier, Federal Express, the Petition did not arrive to the Court of Federal Claims until after the Statute of Limitations had run. *Brief in Opposition, at 2 to 4.*

1. The matter before this Court is about substantial compliance, not equitable tolling.

The Respondent argues that this Court declined to review the question of equitable tolling in *Brice v. Secretary of HHS*, 240 F.3d. 1367 (Fed Cir. 2001), *cert. denied sub nom.*, 534 U.S. 1040 (2001) and therefore, there is no reason for a different result in this case. *See Brief in Opposition, at 4.*

This Court has not previously been presented with the facts it is faced with here. In *Brice*, the Petitioners clearly and knowingly knew when the Statute of Limitations was to run and not only failed to file a timely Petition but waited for more than six months to do so.

In the matter before this court, the Petitioners substantially complied with the requirements of the Vaccine Act. The Petitioners herein timely prepared and timely entrusted their Petition to a reputable third party courier, Federal Express, for overnight delivery to the Court. The Petition forwarded to the Clerk of the Court was "lost" by Federal Express and therefore not timely marked "filed". The copy of the Petition simultaneously forwarded to the Respondent was timely served. The Courts hearing this matter below agreed. *See Petition, at 3 to 4. See also, Brief in Opposition, 3 to 4.*

The Respondent argues that since Congress provided an exception to the Act for filing in the wrong court that there is no room for additional implied exceptions. Petitioners submit that in providing this exception, Congress recognized that a timely prepared and timely forwarded for filing Petition may not be timely

filed with the Clerk of the Federal Court of Claims due to mistake or mishap and that the diligent Petitioner under such circumstances should not be penalized with dismissal of his/her Petition. Clearly, neither the Courts below nor the Respondent herein have questioned the diligence of the Petitioners in the matter now before this Court or the timely preparation and entrustment of Joshua's Petition with a reputable third party courier, Federal Express. Had Federal Express delivered the within Petition to the wrong Court, Joshua's Petition would have survived. *See Taylor v. Sec'y of DHHS*, 34 Fed. Cl. 137 (1995).

Additionally, the Respondent argues that the limitations period of the Vaccine Act "...is part of a detailed statutory scheme which includes other strict deadlines". The Respondent then points to the requirement that the Special Masters issue decisions within 240 days of the filing of a Petition and may suspend proceedings for no more than a total of 150 days. *See Brief in Opposition, 6.* Any practitioner handling vaccine cases knows that most Vaccine Cases take far more than 390 days for a decision to be rendered and, in fact, many have been pending for years without a decision from a Special Master.

Likewise, prior to the decision in *Brice*, the Special Masters, when confronted with fact patterns similar to the one before this Court, had not interpreted the Limitations of Actions provision of the Vaccine Act as containing strict and unyielding deadlines. As more specifically set forth in Petitioners' Brief for Certification, 42 U.S.C. § 300aa-16(2)a states in pertinent part ". . . . no petition *may* be filed for

compensation under the Program for such injury after the expiration of 36 months or after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury . . ." while 42 U.S.C. § 300aa-12(e)(1), states in pertinent part, "upon issuance of the special master's decision, the parties *shall* have 30 days to file with the clerk of the United States Court of Federal Claims a motion to have the court review the decision." (emphasis added). *See Petition 13 to 15.*

Despite the emphatic use of the word "shall" for the filing of a Motion for Review, prior to the *Brice* decision, the Court had, when justice demanded, accepted a Motion for Review after the 30 day period when faced with extraordinary circumstances. In *Raspberry v. Sec'y of DHHS*, 32 Fed. Cl. 777 (1995), a case exactly like the one at bar, the Petitioner mailed a Motion for Review two days before the deadline was to expire utilizing an established courier and relying on the courier's guarantee that the motion would be delivered overnight. The courier failed to live up to it's guarantee, and the motion was delivered one day beyond the thirty day time limit. The Court accepted that Motion as timely filed under the specific facts involved in that matter.

Likewise, the Court permitted the filing of a Petition after the Statute of Limitations had run where the claimant filed his pleading in the wrong court. *See Taylor v. Sec'y of DHHS*, 34 Fed. Cl. 137 (1995). This action supports the intention of Congress to relieve late filing under very limited conditions so as to preserve the Act's intention to compensate vaccine injured individuals who diligently attempt to file their claim. The Vaccine Court

itself recognized, prior to *Brice*, that statutes which create remedial programs must be "liberally" and "broadly" construed in favor of the class which it is intended to assist, *White v. Arlen Realty and Development Corp.*, 374 F. Supp. 151 (D. Md. 1974), when it permitted the *Raspberry* and *Taylor* cases to proceed.

The Vaccine Court's view, prior to *Brice*, recognized that there are limited extraordinary situations which warrant permitting an injured individual to proceed with his/her claim pursuant to the Act that would not, as the Respondent suggests, lead to "prolonged and wasteful collateral litigation concerning the running of the statute of limitations". *See Brief in Opposition, 6.* There would be very few cases coming before the Court where the Petitioner could prove substantial compliance with the filing requirements by providing the Court with proof that the Petition was prepared and forwarded for filing *prior* to the running of the statute, and with timely service upon the Respondent as is the situation in the matter before this Court and was the situation in *Raspberry* and *Taylor.*

These extraordinary situations are why the law provides for an exceptional remedy, reserved for extraordinary circumstances and extended sparingly." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). The person seeking equitable tolling of a statute of limitations must bear the burden of proving that such relief is warranted, and must demonstrate "rare and exceptional circumstances" warranting application of the doctrine, *O'Connell v. Secretary of Health and Human Services*, (Federal Claims, 2004) at 19, citing *Felder v. Johnson*, 204 F. 3d 167, 170-171 (5th

Cir. 2000) by showing that "extraordinary circumstances beyond plaintiff's control made it impossible to file the claim on time." *Seattle Audubon Society v. Robertson*, 931 F. 2d. 590, 595 (9th Circuit 1991)(emphasis added). Such is the case before this Court.

The Respondent argues that, in *Brice*, the Court noted "that the statute of limitations in Vaccine Act cases runs at the time of the first symptom or manifestation of the onset of injury, even if the petitioner reasonably would not know then that the vaccine had caused the injury"; therefore it would be quite odd for Congress to provide for equitable tolling when a petitioner is aware that a vaccine has caused injury but has delayed in filing suit. *See Brief in Opposition, 6.*

It is undisputed that the *Brices* knew that the vaccine had caused the child's injury. It is undisputed that the *Brices* knew when the Statute of limitations was to run. It is likewise undisputed that, not only did the *Brices* fail to file their Petition within the statutory time frame, but they then waited for over six months thereafter to file their Petition. Clearly, it is undisputed that where a Petitioner knows of a vaccine related injury and lets the statute of limitations pass, the rules of equity should not apply.

But those are not the facts in the matter before this Court. Joshua's Petition was timely prepared and entrusted to a reputable third party courier for next day delivery. Had the courier delivered the package to the Clerk of the Court, as guaranteed, Joshua's Petition would have been filed with the Court, not only timely, but prior to the running of the Statute of Limitations.

The courier's loss of the package and it's failure to advise Petitioner of its loss of the package until after the Statute had run caused this matter to now be before the Court.

As the Special Master in this matter pointed out, Petitioners' attorneys for the Vaccine Program are located all over the country. Since the Court does not permit electronic filing of Petitions, Petitioners attorneys have no other means for delivering Petitions to the Clerk of the Court other than to rely upon courier services and U.S. mail to Washington, D.C. *See Petition, Appendix C 29a to 30a.* Therefore, it should not punish the Petitioner who substantially complies with the filing requirements by timely preparing and timely entrusting a Petition to a reputable third party courier who then mishandles the package to the Court, but where the Respondent is timely served.

The Respondent further submits that the Vaccine Act constitutes a waiver of sovereign immunity to an action for a money judgment against the federal government in the Court of Federal Claims and that coupled with "the other special features of the Act . . . reinforces that there is good reason to conclude that equitable tolling is not available. See *John R. Sand & Gravel*, 128 S. Ct at 753, 754." *See Brief in Opposition, 6 to 7.*

Respondent's argument is misguided. The Vaccine Act, unlike *John R. Sand*, and other cases relied upon by Respondent is not a claim against the Federal Government. The Vaccine Act is a remedial program financed by a tax on vaccines creating a fund of money

to provide relief to injured individuals. *Schafer v. American Cyanamid*, 20 F. 3d. 1, 2 (1994); 42 U.S.C. § 300aa-11. In order to facilitate that program, the Federal Government assumed the role of the Respondent for procedural purposes by making whoever is the Secretary of Health and Human Services at the time the named respondent to the action. When Joshua Accvedo was vaccinated, there was a tax on the numerous vaccines he received. That tax went to fund the Vaccine Compensation Program created for individuals just like Joshua, who are injured by mandatory vaccines and who timely prepare and timely forwarded to the Clerk of the Federal Court of Claims a Petition seeking compensation from that fund. However, Joshua is being denied that compensation due to, as Respondent concedes, the "apparent mishandling" of Joshua's Petition by a third party courier, Federal Express. Therefore, Joshua is not seeking a money judgment against the Federal Government; he is seeking compensation from a fund created by the tax his parents paid on the vaccines that he received.

2. Congress provided an equitable remedy where there is substantial compliance witn the Vaccine Act.

Respondent argues that Brockamp stands for the proposition that "equitable tolling is unavailable if there is 'good reason to believe that congress did not want the equitable tolling doctrine to apply'". Respondent further submits what it believes to be examples of these "good reasons". *See, Brief in Opposition, 7.* In so doing, Respondent suggests that Congress created a "categorical bar" to filing after the statutory time frame

in the use of the language "no petition may be filed", but offers no explanation to Petitioners' argument as to why in other sections of the Act, the use of the term "shall be filed" is utilized. *See Petition, 13 to 15.*

Likewise, Respondent submits that Congress intended to limit the "special statutory scheme to those who file claims within the statutory period, subject to a single exception for claims filed in the wrong court." *See Brief in Opposition, 8.*

As set forth above, the contrary is true. Congress recognized the mishaps that a well intentioned Petitioner may face by timely preparing and timely forwarding for filing a Petition that does not reach the Clerk of the Federal Court of Claims because it is misdirected to the wrong Court. Permitting the Petitioner to rectify such a mishap is, in fact, an equitable resolution provided by Congress where there is substantial compliance with the Act.

Additionally, Congress actually provided for more than a "single exception". It provided an equitable resolution to the Petitioner who does not file in time due to a fraud committed by the Department of Justice upon the Petitioner.

To state that Congress did not anticipate the need for equitable remedies under the Vaccine Act when it specifically provided remedies that are equitable in nature to assist diligent Petitioners, who timely prepare and timely forward for filing Petitions which are not timely filed with the Clerk of the Federal Court of Claims either due to a fraud committed by the Department of Justice or because the Petition is directed to the wrong court, is merely choosing to disregard the obvious.

3. Petitioners' diligence and timely service of the Petition upon the Respondent must be considered.

Lastly, Respondent submits that "equitable considerations of petitioners' asserted diligence and the issue of prejudice to the respondent are not relevant to the analysis" and that to consider same would be inconsistent with the statutory scheme designed to ensure that claims are settled "quickly and easily." *See Brief in Opposition, 9.*

In other words, Respondent can provide no opposition to Petitioners' substantial compliance with the Statutory requirements in this matter and therefore submits that it is an irrelevancy not to be considered.

Had the Special Master receiving this matter, under the circumstances, been permitted to rule as had been done prior to *Brice*, in *Raspberry* and *Taylor* , based upon the timely service upon the Respondent and proof that a timely petition had been timely entrusted to Federal Express on June 25, 2007 for overnight delivery, three days before the Statute of Limitations was to have run, this matter may have been "quickly and easily" resolved rather than working it's way up the Federal Circuit for two years.

Likewise, since the Court, as set forth above, does not permit for electronic filing of a Petition, Petitioners had no alternative but to put their faith in Federal Express that it would live up to it's guarantee and deliver the package entrusted to it in a timely manner.

Petitioners submit that it was not so long ago that anthrax and the events of 911 closed Court Houses making timely filings an impossibility, nor is it inconceivable that a courier could get sick or be involved in an accident or, as here, lose the package and fail to timely deliver the package he/she is transporting.

Where proof is provided that a Petitioner has complied with the statutory requirements, but due to factors not within their control, the Petition is waylaid from reaching the Clerk of the Court on time, concessions have been made and those Petitions have been handled within the Vaccine Program. Clearly, there is no case law to suggest otherwise.

It is also notable that the Court System will give leeway to filing deadlines in the event the Court is closed due to inclement weather. Why? Because that is the equitable solution to a situation that arises and is out of the control of the filing party. RCFC App B ("Vaccine Rules") R. 19a (2002)

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

MINDY MICHAELS ROTH
BRITCHER, LEONE & ROTH, LLC
175 Rock Road
Glen Rock, N.J. 07452
(201) 444 - 1644

Attorneys for Petitioners